U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

Date: December 7, 1988
Case No. 87-INA-161

IN THE MATTER OF

CATHAY CARPET MILLS, INC.
d.b.a. THE WALNUT COMPANY,
Employer

on behalf of

PATRICK WEN-PWU HUANG
Alien

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Guill, Schoenfeld, and Tureck, Administrative Law Judges

NICODEMO DeGREGORIO
Administrative Law Judge

DECISION AND ORDER ON REMAND

This case is before the Board of Alien Labor Certification Appeals (Board) on remand from the United States District Court for the Central District of California (the Court).

Background

By Order based on the parties' Joint Stipulation To Remand, entered May 4, 1988, the case was remanded "to the Administrative Law Judge for further proceedings pursuant to 20 C.F.R § 656.26(e)." The parties expressly stipulated that it was not their intention to seek further remand of the matter from the Administrative Law Judge to the Certifying Officer, and, indeed, that they would oppose any such remand. The Order further provided that "the Administrative Law Judge on remand is to have available for review both the Certified Administrative Record and the record that has been developed in the federal court litigation," and that the parties should be "provided an opportunity to present further briefing to the Administrative Law Judge."

This case was before the Court on judicial review of a decision of an Administrative Law Judge, rendered pursuant to 20 C.F.R. § 656.26(e) on March 20, 1987. By final rule published on April 8, 1987, section 656.26(e) was repealed, and the Board of Alien Labor Certification Appeals was established, with exclusive jurisdiction to review denials of labor certifications

where the requests for review are filed on or after May 8, 1987. 52 Fed. Reg. 11,217 (April 8, 1987). Because the Court's Order refers throughout to "the Administrative Law Judge" and cites the former section 656.26(e), the Order was understood as remanding the case to the Administrative Law Judge who had originally decided it. And because that Judge is now unavailable to this Office, the case was referred to the undersigned in his individual capacity. On October 27, 1988, an Order was issued giving the parties until November 21, 1988, to file briefs.[1]

On November 22nd Employer's brief was received. Employer objects to the assignment of the case to a single administrative law judge on the grounds that (1) it is in violation of the Court's explicit direction, and (2) that under the regulations presently in effect only the Board has jurisdiction to conduct administrative review of denials of labor certifications. With regard to the first ground, Employer's counsel represents that at a hearing held on October 12, 1988 the Court explicitly stated that "administrative law judge" as used in the Court's remand Order refers to the Board. In a memorandum of October 14, 1988, transmitting the record of the case directly to the Board, the Special Assistant U.S. Attorney who represented the Labor Department before the Court also states that at the October 12th hearing the Court ordered that the Board render a decision within 60 days in the case. Finally, in a letter dated November 25th, the attorney representing the Department on remand admits that the U.S. Attorney, on behalf of the Department, has not objected to the remand of the case to the Board. In the absence of a transcript of the court proceedings on October 12, 1988, the Board accepts the representation of counsel, and takes jurisdiction of the case pursuant to the Court's direction.

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[1] In the afternoon of December 6, 1988, after the Board had considered and voted on the decision in this case, counsel for the Certifying Officer personally delivered to this office a sworn declaration of Mr. Walter Kang Yang. Presumably, a copy of the declaration was mailed to Walnut's counsel. This document was offered to refute Walnut's rebuttal that Mr. Yang was unavailable for an interview within the recruitment period.

Given the Secretary's responsibility to certify that there are no able U.S. workers available before granting certification, all relevant information should be considered when it is reasonable to do so. As courts of appeals refuse to consider matters not timely appealed from trial courts and new evidence that could have been discovered prior to trial, so must this Board enforce the regulation which requires the development of evidence before certifying officers. See 20 C.F.R. § 656.26(b)(4). It should be noted here, that by order dated November 30, 1988, this Board, pursuant to 20 C.F.R. § 656.27(c)(4), denied, as untimely, the certifying officer's request for a de novo hearing.

The Board's position here is not to be construed as a comparison of the Board to a court of appeals, for surely it is not. Rather, it is an expression of the importance for labor certification matters to be timely developed before certifying officers who have the resources to best determine the facts surrounding the application. Specifically, the Board's function, particularly as this case devolved, is to review the Department's several certifying officers' denial of certification upon appeal request by employers, a practice designed to enable the expeditious resolution of hundreds of other such appeals annually. For this reason, the Certifying Officer's offer of this newly developed information is refused.

Statement of the Case

On August 13, 1985, Walnut Company (Walnut) filed an application for alien labor certification on behalf of Patrick Wen-Pwu Huang (the alien). The certification would allow the alien to enter the United States in order to work for Walnut as a Market Research Analyst at a salary of $2,479.00 per month. The application contains a description of the job duties to be performed, and states the requirements for the position. Certified Administrative Record (A.R.) 97.

Walnut attempted to recruit U.S. workers for the position, by advertising it in The Wall Street Journal and posting a notice of the job opportunity on its employee bulletin board. On January 2, 1986, Walnut filed a report of the results of its recruitment efforts, concluding that it had been unable to find a qualified individual to fill its position. Insofar as relevant to this case, the report was accompanied by copies of certified letters sent to two U.S. applicants for the job, Thomas Y. Liou (Liou) and Walter Kang Yang (Yang), which scheduled personal interviews with the applicants and summarized the outcome of the appointments. A.R. 106, 109, 112, 114, 116. By letter dated December 30, 1985, Walnut thanked Yang for calling to cancel the scheduled interview, as he no longer wished to be considered for the position of Market Research Analyst with the company. A.R. 112. By letter of December 30, 1985 Walnut thanked Liou for coming to its office. The letter, from Walnut's Operations Manager to Liou, reads as follows:

> Thank you for coming to our office on December 17, 1985. During the course of the interview I became aware of the fact that you were looking for a salary which was far in excess of the salary that we were offering, and in fact, the salary that was offered in the advertisement that you responded to.
>
> After interviewing all other candidates we subsequently spoke with you to ask you if you would be interested in taking up the position at the salary we were offering, and at that time you stated again that you would not be interested in the position unless we could match your salary demands. Therefore, we must at this time remove your name from further consideration.

Some months later, the Certifying Officer sent questionnaires to Yang and Liou. The Yang questionnaire was returned unsigned and unsworn. A.R. 95-96. The Liou questionnaire was signed but not sworn. A.R. 93-94.

Yang's responses to the questionnaire stated that he did not report for the interview "because the interview time is at weekday (sic). I told the company I can't go." A.R. 95. Yang also stated that Walnut had not offered the job to him, that he would have accepted it had it been offered, and that he was working at the time of the scheduled interview.

The relevant responses in the Liou questionnaire stated that he would have accepted the job if it had been offered, and specifically that he did not refuse the position because the salary was too low. A.R. 93-94. It may be worth noting that most of the questionnaire questions were

answered either by checking or writing "yes" or "no." But the response to question 6 on the Liou questionnaire is different, and deserves quotation. This question is composed of three parts:

1) "Did the employer offer you the job?" No answer given.

2) "If no, would you have accepted it had the offer been made?"

ANSWER: "Yes. Note. The interviewer recommend (sic) me to talk to the owner Mr. Tang. but (sic) fruitless."

3) "What reason did the employer give for not hiring you?"

ANSWER: "I suspect they use this just to get someone a permanent residency."

Finally, Liou commented: "They need people or not. There is not a set job description nor salary discussion." A.R. 93-94.

Based on these questionnaires the Certifying Officer issued a Notice of Findings, proposing to deny labor certification. For grounds, the Certifying Officer stated that Walnut's recruitment report as to Liou was contradicted by his questionnaire response that he did not refuse the job offer because the salary was too low. As to Yang, the Certifying Officer stated that, contrary to Walnut's report, the questionnaire response indicated that Yang had told Walnut that the time and date of the interview were inconvenient because he was working "and apparently no alternative time or date for a job interview was offered by the employer." A.R. 91. The Notice of Findings also stated that Walnut was in noncompliance with 20 C.F.R. § 656.21(b)(1) which requires that an employer document reasonable good faith efforts to recruit U.S. workers.

In response to the Notice of Findings, Walnut asserted that Liou stated to the interviewer that he wanted a salary of $50,000.00 a year, but he would go as low as $40,000.00. The response further states that Liou's demand "pretty much acted to terminate the interview" inasmuch as the company was not willing to pay more than the advertised salary of $29,748.00 a year. A.R. 81. In support of its contention, Walnut submitted a copy of an application for employment filled out by Liou at the time of the interview. The application contains a salary history showing that Liou had been earning $60,000.00 a year from 1982 to 1985, and about $39,600.00 a year from 1980 to 1982. A.R. 83. The application also indicates that Liou desired a salary of $40,000.00.

With regard to Yang, Walnut asserted on rebuttal that when Yang called to cancel the interview scheduled for December 17, 1985, he was asked to state a more convenient time for an interview, and Yang wanted to reschedule the interview on a date more than one month later. Yang was informed that the company could not wait that long, but he declined to schedule an interview at any earlier time. Walnut also stated that it was under a deadline to file a report of its recruitment efforts not later that January 6, 1986. The report is in fact dated January 2, 1986.

A.R. 106. Finally, the company requested that since its statements were made under penalty of perjury, the Certifying Officer should obtain sworn statements from Liou and Yang. A.R. 82, 79. In a letter of July 30, 1986, to Walnut's attorney, the Certifying Officer denied the request on the grounds that "this office will not obtain sworn statements from these applicants because we believe that applicants Liou and Yang are not a direct party in this matter and would have no reason to state anything but the truth." A.R. 78.

On October 10, 1986, the Certifying Officer issued his Final Determination denying certification. He appeared to accept Walnut's contention that the Yang questionnaire did not refute its version of the facts. A.R. 71. However, the Certifying Officer accepted the Liou's questionnaire response concerning his willingness to accept the job at the advertised salary ($2,479.00 a month), because Liou is not a party to this case and would have no reason to state anything but the truth. A.R. 72.

Discussion

I

We deem it advisable to state at the outset what issue is presented by the facts of this case. The Certifying Officer relied on sections 656.21(b)(1) and 656.24(b)(2)(ii) of Title 20, Code of Federal Regulations. A.R. 71. Neither citation is apposite. Section 656.21(b)(1) applies where an "employer has attempted to recruit U.S. workers prior to filing the application . . . ," while the dispute in this case arises out of the recruitment process after the filing of the application. Section 656.24(b)(2)(ii) is likewise inapplicable. This regulation prescribes the standard a Certifying Office is to follow in determining whether a U.S. worker is able and qualified for a job. In this case Walnut did not reach the question of whether either Yang or Liou was qualified to perform its job. These applicants were rejected on the grounds that Yang was not available for the job and Liou was not willing to take it at the offered salary. Thus, the issue raised is one of availability, not qualifications. Specifically, the issue, as we see it, is whether Walnut has documented that the two job applicants "were rejected solely for lawful job-related reasons," as required by section 656.21(b)(7). On this issue, we agree with counsel for the Certifying Officer that the burden of proof, in the two-fold sense of burdens of production and persuasion, is on the employer, where it belongs. It is for Walnut to justify its own conduct, to prove that Yang and Liou were not hired for a lawful job-related reason.

II

Both parties agree in their respective briefs that the admissibility of hearsay statements in this administrative proceeding is governed by Calhoun v. Bailar, 626 F.2d 145 (9th Cir. 1980), cert. denied, 452 U.S. 906, 101 S.Ct. 3033 (1981). That case arose in the context of a discharge hearing, where hearsay statements in the form of affidavits were received in evidence without objections and were relied upon by the hearing examiner, even though at the hearing the statements were disavowed by the affiants on direct examination. The Ninth Circuit rejected any per se rule that hearsay can never be substantial evidence. The court, in upholding the reliance on the hearsay as substantial evidence, held that in order to constitute substantial evidence, hearsay,

like any other evidence, must meet the minimum criteria of admissibility, i.e., it must have probative value and bear indicia of reliability. 626 F.2d at 149. "Thus, it is not the hearsay nature per se of the proffered evidence that is significant, it is its probative value, reliability and the fairness of its use that are determinative." 626 F.2d at 148.

Calhoun involved adjudication following an oral evidentiary hearing, and much of its discussion turns on such factors as hearsay, admissibility, and failure to object to admission. It is questionable whether they are applicable to this case, where there was no oral evidentiary hearing and evidence was submitted by mail. Nonetheless, Calhoun has relevance here because it also discusses factors which assure reliability and probative value, and because it stresses the importance of the procedure's integrity and fundamental fairness. Therefore, the evidence in this case must be judged in the light of the reliability factors delineated in Calhoun, to the extent they are applicable.

III

Turning to the facts of this case, we conclude that the denial of certification cannot be affirmed. The denial is based entirely on questionnaires -- the Liou questionnaire and, possibly, the Yang questionnaire as well.

As stated above, it appears that the Certifying Officer accepted Walnut's rebuttal of the finding based on the Yang questionnaire response. At any rate, we find that this questionnaire can only corroborate Walnut's explanation of why Yang was not hired. For, putting aside the question of what weight is due to an unsigned statement consisting mostly of check marks, we point out that the handwritten answers simply indicate that Yang told the company that he could not come to the interview, apparently because he was working. A.R. 95. As far as it goes, this response confirms the employer's explanation of the occurrence. And because the response goes no farther, it does not contradict Walnut's assertions that it tried to reschedule the interview, but did not do so because Yang would not be available for at least one month. A.R. 82.

With regard to the Liou questionnaire, some general observations are in order. First, we believe that Walnut's counsel attaches more significance to the issue of the authentication of the questionnaire than we can find in it. We agree that the Certifying Officer could not say "with certainty" that the response came from Liou. But people long ago discovered that they can do without certainty. We find the questionnaire response sufficiently authenticated by such factors as the address to which the questionnaire was mailed, the signature of the addressee, and the reference in the response to the interview scheduled by Walnut and its alleged owner Mr. Tang. Of course, the fact that the response is not sworn raises a different question, and in our view does detract from its reliability, since an oath tends to impress the mind with the duty to tell the truth. Cf. Federal Rule of Evidence 603.

Second, Walnut's account of what happened at the interview is more persuasive than the Liou questionnaire response because the account is in narrative form, detailed, and in part corroborated by the application form filled out by Liou. A narrative account carries in itself some indicia of reliability: if it discloses internal inconsistencies, or, in light of general experience,

improbabilities, its truthfulness may be suspected; on the other hand, a natural coherence of details would give the account at least an appearance of truth. Walnut's rebuttal tells a likely story. A.R. 81. We cannot apply this test to the Liou responses, consisting of check marks, "yes" answers, and disconnected notes which tend to impugn Walnut's motives rather than explain what happened at the interview. A.R. 93-94. Also, the fact that Liou earned $60,000.00 a year for the three years preceding the interview, together with the fact that he indicated on the employment application that his desired salary was $40,000.00, tends to corroborate Walnut's report that Liou would not accept significantly less than $40,000.00 a year.

Third, we note that Liou's response to question 6 of the questionnaire raises more questions than it answers. There is no direct response to the question whether the company had offered him the job. As to the reasons given by the company for not hiring him, Liou only volunteers a speculation questioning the company's good faith. Finally, the note about the interviewer referring Liou to the owner, Mr. Tang, is ambiguous and calls for clarification which was never obtained. Because we cannot make out the meaning of the note, this part does not discredit Walnut's reports regarding the interview.

As part of Walnut's rebuttal, its attorney, in a long letter dated August 20, 1986, made specific objections to the use of the two questionnaires. Of particular relevance here, counsel urged the Certifying Officer to seek clarification of Liou's responses concerning the interview, by asking for a detailed statement made under penalty of perjury. As already stated, the request was denied, on the ground that Liou had no reason to state anything but the truth.

While the case was pending before the Court, Walnut's counsel declared under penalty of perjury that Walnut did not contact Yang or Liou because the Certifying Officer's policy prohibited employers and their attorneys from contacting U.S. applicants after submitting recruitment reports. J.R. 18. The United States Magistrate noted that this declaration had not been disputed. J.R. 20, at 9. Thus, Liou was available only to the Certifying Officer, and the Certifying Officer refused to seek a clarification.

In sum, we are of the view that the Liou questionnaire has little probative value and its use against Walnut is fundamentally unfair under the circumstances of this case. For these reasons, Walnut's recruitment report and rebuttal may not be rejected on the basis of the Liou questionnaire. Therefore, Walnut has documented, as this term is construed in In the Matter of Gencorp., 87-INA-659 (Jan. 13, 1988) (en banc), that Yang and Liou were rejected for lawful, job-related reasons.

IV

Finally, we note that there is another reason, sufficient by itself, to vacate the denial of certification. The denial is based on an evaluation of the evidence which is flawed by the application of an erroneous standard.

In In the Matter of Dove Homes, 87-INA-680 (May 25, 1988) (en banc), the Certifying Officer had stated that when an employer's response differed from an applicant's response the

weight of the evidence was "generally" afforded the applicant. The Board disapproved this statement, pointing out that while an employer has an incentive to support its request for labor certification, a disappointed job applicant may have a biased view of the facts. In the case at hand, the Certifying Officer took a more extreme position. He stated that Liou, solely because he was not a party to the proceeding, had no reason to state anything but the truth. The other side of this position, although not stated, is that Walnut lied because it is a party. In evaluating the evidence primarily in terms of party status, the Certifying Officer committed a clear error of judgment and failed to consider other relevant factors. Agency action which is so flawed cannot be sustained. See Kwan v. Donovan, 777 F.2d 479 (9th Cir. 1985).

V

By reason of the foregoing, we conclude that the Certifying Officer's determination denying certification must be reversed.

ORDER

The Certifying Officer is directed to grant labor certification.

NICODEMO DeGREGORIO
Administrative Law Judge

Washington, D.C.

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